UNITED NATIONS CONVENTION
ON THE LAW OF THE SEA

CLCS

COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF

Distr.
GENERAL

CLCS/14
18 May 1999

ORIGINAL: ENGLISH

Fifth session
New York, 3-14 May 1999

LETTER DATED 30 APRIL 1999 FROM THE LEGAL COUNSEL, UNDER-SECRETARY-GENERAL OF THE UNITED NATIONS FOR LEGAL AFFAIRS, ADDRESSED TO THE CHAIRMAN OF THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF

Legal opinion as to the most appropriate procedure in cases where it might be necessary to institute proceedings following an alleged breach of confidentiality

1. I am writing in response to your letter of 15 March 1999 (CLCS/13). In the letter you informed me that as, pursuant to annex II ("Confidentiality") to the rules of procedure of the Commission on the Limits of the Continental Shelf (CLCS/3/Rev.2), a coastal State may classify any data and other materials included in its submission to the Commission as confidential, at its fourth session, held in New York from 31 August to 4 September 1998, the Commission decided to seek my legal opinion as to which procedure would be the most appropriate in cases where it might be necessary to institute proceedings following an alleged breach of confidentiality. In that connection you referred, in particular, to rules 4 and 5 of annex II to the rules of procedure of the Commission.

2. Rule 4, which relates to the duty to preserve confidentiality, stipulates that:

> "1. The members of the Commission shall not disclose, even after they cease to be members, any confidential information coming to their knowledge by reason of their duties in relation to the Commission.
>
> "2. The duty of the members of the Commission not to disclose confidential information constitutes an obligation in respect of the individual's membership in the Commission."

Rule 5, concerning enforcement of rules on confidentiality, provides that:

"1. The Secretary-General shall provide the Commission with all necessary assistance in enforcing the rules concerning confidentiality.

"2. The Commission may institute appropriate proceedings and shall make known its findings and recommendations."

General observations

3. The United Nations does not have any standard procedure that could be recommended to the Commission for its consideration as a model to be applied in cases of an alleged breach of confidentiality. However, in instituting, pursuant to paragraph 2 of rule 5 of annex II, appropriate proceedings for dealing with this type of situation, the Commission may take into account the following considerations:

4. In accordance with rule 3 of annex II, access to confidential material submitted by the coastal State or States shall be confined to the members of the Commission or its relevant subcommissions that have been requested to examine the submission and to staff members of the United Nations Secretariat designated to assist the concerned members of the Commission or its subcommissions.

Staff of the United Nations Secretariat

5. Pursuant to Article 97 of the Charter of the United Nations, the Secretary-General of the United Nations is the chief administrative officer of the Organization. Article 101 of the Charter provides that the Secretary-General shall appoint the staff of the Organization under regulations established by the General Assembly. Thus, the staff of the United Nations perform their duties under the administrative authority of the Secretary-General.

(a) Requirement to observe confidentiality

6. Staff members of the United Nations Secretariat who are assigned to assist the Commission and have access to confidential material are bound to preserve the confidentiality of that information in accordance with the applicable staff regulations and rules, and administrative instructions issued in their furtherance.

7. In his bulletin dated 9 August 1994 (ST/SGB/272), the Secretary-General drew the attention of all staff members to their obligations with regard to security of information under the staff regulations and to their personal responsibility for the proper protection of information which they might be called upon to handle in the course of their duties. The Secretary-General referred, in this regard, to staff regulation 1.5 providing that staff members are required to "exercise the utmost discretion in regard to all matters of official business. They shall not communicate to any person any information known to them by reason of their official position that has not been made public, except in the course of their duties or by authorization of the Secretary-General. Nor shall they at any time use such information to private

advantage. These obligations do not cease upon separation from the Secretariat."

8. Staff regulation 1.2 (I) of the revised text of article I of the Staff Regulations, adopted by the General Assembly in its resolution 52/252 of 8 September 1998 and which is based on the ideas of staff regulation 1.5, further stipulates that "staff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service."

(b) Disciplinary proceedings and measures

9. A breach of confidentiality constitutes non-compliance with the aforementioned obligations and may be qualified as misconduct on the part of that staff member. In accordance with the Staff Regulations and Rules, staff are held accountable through disciplinary measures for failure to comply with their obligations and the standards of conduct.

10. Staff regulation 10.2 stipulates that the Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory and that he may dismiss a member of the staff for serious misconduct.

11. Staff rule 101.2 (a) of the revised text of chapter 1 of the 100 series of the Staff Rules, noted[1] by the General Assembly in its resolution 52/252, states in this regard that:

> "Disciplinary procedures set out in article X of the Staff Regulations and chapter X of the Staff Rules may be instituted against a staff member who fails to comply with his or her obligations and the standards of conduct set out in the Charter of the United Nations, the Staff Regulations and Rules, the Financial Regulations and Rules, and all administrative issuances."

12. Staff rule 110.1 further provides that failure by a staff member to comply with his or her obligations under the Charter and the aforementioned regulatory instruments may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, leading to the institution of disciplinary proceedings and the imposition for misconduct of disciplinary measures referred to in staff rule 110.3.

13. In order to provide guidance and instructions on the application of chapter X of the Staff Rules and outline the basic requirements of due process to be afforded a staff member against whom misconduct is alleged, the Secretary-General on 2 August 1991 issued an administrative instruction (ST/AI/371) which addresses such issues as initial investigation and fact-finding, due process rights and referral to and procedures of a Joint Disciplinary Committee, etc.

(c) Privileges and immunities and their waiver

14. It should also be noted that, although pursuant to section 18 (a) of the Convention on the Privileges and Immunities of the United Nations[2] staff members as officials of the Organization are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity, according to section 20 of that Convention privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. Therefore, under the Convention, the Secretary-General has the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

(d) Conclusions

15. It follows from the above that as pursuant to the Charter of the United Nations, the staff of the United Nations are under the administrative authority of the Secretary-General, in cases of an alleged breach of confidentiality by a staff member assisting the Commission the matter will be dealt with in accordance with the aforementioned United Nations procedures applicable to the staff of the Organization.

Members of the Commission

16. In accordance with article 76 and annex II to the United Nations Convention on the Law of the Sea, the members of the Commission are elected for five years by a Meeting of States Parties convened pursuant to article 319, paragraph 2 (e), of that Convention. They serve on the Commission in their personal capacity and are eligible for re-election (annex II, article 2, para. 4). The rules of procedure of the Commission require that each member of the Commission shall solemnly declare, before assuming his or her duties, that he or she will perform those duties honourably, faithfully, impartially and conscientiously.

17. The Law of the Sea Convention is silent on the question of what actions should be taken if a member of the Commission is accused of being involved in activities inconsistent with his or her duties as a member of the Commission. An alleged breach of confidentiality will constitute such an activity because the members of the Commission are under the obligation not to disclose any confidential information obtained in the course of their duties as members of the Commission (rule 4 of annex II to the rules of procedure of the Commission). The Convention also does not provide any guidance on the question of who will have the authority to undertake an investigation of the accusations against a member of the Commission and to make a determination, on the basis of such an investigation, as to whether those accusations are valid.

18. You will recall that in my legal opinion dated 11 March 1998 on the applicability of the Convention on the Privileges and Immunities of the United Nations to the members of the Commission (CLCS/5) it was pointed out that "it would appear that, by established precedent in respect of similar treaty organs, the members of the Commission on the Limits of the Continental Shelf can be

considered to be experts on mission covered by article VI of the General Convention" (ibid., para. 5).

(a) Experts on mission - requirement to observe confidentiality

19. There are currently no special regulations or rules applicable to experts on mission. By paragraph 9 of resolution 52/252, the General Assembly requested the Secretary-General to expedite the submission to the Assembly, by its fifty-fourth session, of appropriate regulations and rules governing, inter alia, the status, basic rights and duties of experts on mission. The legislative basis for the adoption of the proposed regulations will be Article 105, paragraph 3, of the Charter of the United Nations, which empowers the Assembly to make recommendations with a view to determining the privileges and immunities of "officials" of the Organization and to propose conventions to Member States for that purpose. The Assembly did so by adopting in 1946 the Convention on the Privileges and Immunities of the United Nations, which in its article VI defines the privileges and immunities of experts on mission. The proposed regulations, a draft of which is currently being finalized by the Secretariat, are modelled on the revised text of article I of the Staff Regulations referred to above.

20. Draft regulation 2 (f) relating to the disclosure of information provides the following:

> "Officials and experts on mission shall exercise the utmost discretion in regard to all matters of official business. Officials and experts on mission shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. If they are not appointed by the Secretary-General, such authorization shall be by the body that appointed them. These obligations do not cease upon the cessation of their official functions."

21. In the commentary to the draft regulations prepared by the Secretariat to assist the General Assembly in deliberating on this matter, with reference to regulation 2 (f) it is observed that it may be difficult to enforce its last sentence, but at the very least, if a former expert on mission ignores the obligation in this draft regulation, his or her official file could be noted to prevent re-engagement of that person.

(b) Disciplinary proceedings and measures

22. The United Nations does not have established procedures for dealing with cases of non-observance of their obligations by experts on mission appointed by intergovernmental bodies. The newly proposed draft regulations, referred to above do not contain any provisions regarding such procedures either.

(c) Privileges and immunities and their waiver

23. As the members of the Commission are considered, in accordance with the legal opinion noted above as experts on mission, they enjoy the privileges and

immunities accorded to such experts pursuant to article VI of the Convention on the Privileges and Immunities of the United Nations, including immunity from legal process of any kind. Section 23 of that article states that the privileges and immunities are granted to experts on mission in the interests of the United Nations and not for the personal benefit of the individuals themselves, and that the Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

24. Draft regulation 1 (e) of the proposed regulations in this regard stipulates that in any case where an issue arises regarding the application of the privileges and immunities enjoyed by experts on mission, an expert on mission shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived, in accordance with the relevant instruments.

Recommendations

25. As there are no model procedures that could be recommended to the Commission, the latter may wish to consider elaborating its own procedures which correspond to the special nature of the Commission as a body whose members are experts acting in their personal capacity.

26. It appears that the special nature of the Commission may require that any allegations of a breach of confidentiality by a member of the Commission need to be investigated by the Commission itself. Such an investigation may be conducted either by the Commission as a whole or by a panel consisting of three or five members appointed by the Commission for that purpose (the investigating body). It is of paramount importance that under the procedures approved by the Commission a member of the Commission who is accused in a breach of confidentiality be afforded due process. Therefore, the concerned member of the Commission should have the right to have access to all the documentation related to the allegations of a breach of confidentiality and to submit written or oral observations to the investigating body within a specified time. Investigation of allegations should be conducted in strict confidentiality to avoid tarnishing the reputation of the member concerned during that process. Having completed the examination of the case, the investigating body should prepare a report on its findings. The report should contain the following:

(a) The allegations of a breach of confidentiality;

(b) The statement of the concerned member of the Commission;

(c) A synopsis of the evidence and the evaluation of it by the investigating body;

(d) The findings, indicating which of the allegations, if any, appear to be supported by the evidence;

(e) The conclusions of the investigating body;

(f) Dissenting or separate opinion, if any.

27. Since the Commission is a body which is elected by the Meeting of States Parties, a report of the investigating body should be forwarded to the Meeting.

28. I hope that the above considerations will assist the Commission in defining its proceedings in case of an alleged breach of confidentiality on the part of a member of the Commission.

(Signed) Hans CORELL
Under-Secretary-General
for Legal Affairs
The Legal Counsel

Notes

[1] Promulgation of staff rules is the prerogative of the Secretary-General.

[2] United Nations, Treaty Series, vol. I, p. 15.